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EDITORIALS

Controlling Costs in Labor Arbitration

FOR a number of years, the problem of arbitrators' fees, as an important factor in the cost of labor arbitration, has been a perplexing one. Frequent discussions with arbitrators, and with labor and management representatives, have produced some suggestions for reform and improvement. But it must be admitted that, despite all measures taken, no satisfactory solution has yet been found.

What concerns us here is a general problem, not the conduct of a few individual arbitrators. To be sure, complaints are occasionally heard about an arbitrator who inflates his bills, charging for time believed not to have been actually spent. These rare but distressing incidents do not present the difficult problem. Arbitrators who engage in such practices soon render themselves unacceptable to parties; administrative agencies withhold their names from lists going to companies and unions. Thus, the problem of the unethical individual solves itself. But there remains ground for concern about the cost of service rendered by the overwhelming majority, the honest and conscientious arbitrators whose integrity has never been questioned. There is a growing danger that they may be pricing themselves—and arbitration—out of the market.

Preference for Professional Arbitrators

The roots of the problem go back to the immediate post-war period, when War Labor Board controls were abolished and the government discontinued the practice of paying arbitrators. At that time, it will be recalled, labor and management representatives decided to continue arbitration clauses on a private, voluntary basis, employing arbitrators who would receive compensation from the parties. It is relevant to our present discussion that by the time World War II was over the non-professional arbitrator—the public-spirited citizen who would take time off from his private occupation to hear and decide a case as a public service, without fee—had virtually disappeared from the scene.

Soon after the re-constitution of arbitration on a private, volun-

tary basis it became clear that labor and management representatives preferred arbitrators who were industrial relations specialists. The parties wanted men who, while not following precedent in a literal sense, could be expected to render predictable decisions within the general framework of modern collective bargaining contract interpretation. These arbitrators were paid at a full professional rate per day. Furthermore, as the volume of cases increased, parties tended to rely more and more on the same small group of individuals. Thus the labor arbitrator became not only a professional man, but often a *full-time* professional arbitrator, with no time left to earn his income from any other source. The effect on the cost of arbitration was inevitable.

Typical Case Costs $100 to $300

In the typical labor-management arbitration case today, the arbitrator charges at least $100 for each day of hearing and for each day

(*Continued on Page* 26)

AMONG OUR CONTRIBUTORS

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MANAGEMENT PREROGATIVES AND PLANT RULE VIOLATIONS

by Lawrence Stessin

A curious paradox in labor arbitration revolves around "plant rules and regulations." In a real sense, every arbitration is born of a breach of industrial behavior. These violations may have several forebears. They may stem from specific rules, promulgated by the company as part of management's right to lay down the procedures by which the organization will be run. The regulations might or might not be incorporated into the union agreement, but nevertheless they carry the stamp of authority and employees are expected to render proper respect to them. Where the rules have been clothed in the luxury of spelled out formulae, arbitrators have small trouble in arriving at their decisions. In most such cases, the arbitrator's function is to apply the yardstick of "reasonableness" to the employer's exercise of his authority.

But what if there are no written rules—or an alleged violation of a rule has occurred which has not been included in the contract or the company policy manual? Does that mean that the employer is destined to bear the burden of the violation without authority to curb the employees' activities?

The Effect of the "Management Prerogative" Clause

A central issue in application of discipline for violation of plant rules is the effect of the clause, found in most contracts, which reserves to management the right to "direct the work forces" and to discipline employees for misconduct. This problem takes on particular significance in that few establishments operate on the basis of a definite rule, with a prescribed punishment for the violation thereof, covering every possible type of employee misconduct. Inevitably, management is forced into the position of asserting that an "unwritten rule" exists covering the situation or that a new rule

must be promulgated. Here we come upon two diametrically opposed theoretical premises.

One view, generally held by management spokesmen, is that the collective bargaining agreement is not the *source* of an employer's authority to "direct the working forces" but, to a greater or lesser extent, a *limitation* of that authority. By this view, management has all of its traditional and customary powers except to the extent it bargains them away in drafting a contract.

> When we speak of the term "management rights," we are referring to the residue of management's pre-existing functions which remain after the negotiation of a collective bargaining agreement. In the absence of such an agreement, management has absolute direction of the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law.[1]

At the other extreme is the view that labor too has "residual rights" which pre-date the legal right to bargain. The collective bargaining agreement is therefore not the exclusive source of authority for either side or a limitation on one more than the other. It is both a source of authority and a limitation of power for both sides of the bargaining table.

> Labor always had many inherent rights, such as the right to strike, though its exercise could lead to varying consequences; the right to organize despite interference from management, police powers and even courts; the right to a fair share of the company's income even though this right was often denied; the right to safe, healthful working conditions with adequate opportunity to rest. Failure of management to recognize these rights does not indicate they did not exist. . . . Collective bargaining does not establish some hitherto non-existing rights; it provides the power to enforce rights of labor which the labor movement was dedicated to long before the institution of arbitration had become so widely practiced in labor relations.[2]

Between these two views there are infinite variations. They generally find expression in grievances over discharge and other forms of discipline most clearly when management seeks to promulgate and

1. James C. Phelps, *Management Rights and the Arbitration Process* (Bureau of National Affairs, 1956), p. 105.
2. Arthur J. Goldberg, "Management's Reserved Rights: A Labor View," in *Management's Rights and the Arbitration Process* (Bureau of National Affairs, 1956), p. 119.

enforce a new working rule, without having negotiated it with the union, in the absence of specific authorization in the contract to do so.

On Invoking New Working Rules

The question of whether a company, in the absence of any specific authorization in the contract, may promulgate a new rule was faced directly by Arbitrator Vernon L. Stauffer in a case involving the Columbus Coated Fabrics Corporation.[3] Here, management sought to enforce a rule against fighting which the union thought was unduly harsh toward employees who merely defended themselves against aggressors. The arbitrator said:

> Some question was raised on the part of the union as to the validity of the rules established by the company, due to the fact that they were not negotiated between the company and the union. In the opinion of the Arbitrator, such rules, so long as they are reasonable, need not be negotiated, and it is a reserved right and prerogative of management to establish such rules. . . . However, application of its rules, including disciplinary action taken by the company thereunder, is subject to grievance procedure.

That an employee must obey a work order even though he disagrees with it where grievance procedure gives him an avenue of later protest is virtually a settled matter in industrial relations. But when the Armstrong Tire and Rubber Company[4] sought to formulate this concept into a rule and enforce it against an employee, the union denied the company's right to do so. Arbitrator Whitley P. McCoy found authority in the management prerogative clause:

> Though these rules were not negotiated with the union, and the union has never expressly assented to them, neither has it raised any question by grievance or otherwise, as to the reasonableness of the rules or the penalties specified. If there were any doubt, which there is not in my mind, as to the right of the company to enact and post reasonable rules, such doubt would be disposed of by the fact that Article III, Section 11, expressly reserves to the company the right to make necessary and reasonable rules of procedure and conduct.

The prevailing view of management's rights to invoke rules was

3. *Columbus Coated Fabrics Corporation,* 26 LA 638.
4. *Armstrong Tire and Rubber Company,* 27 LA 945.

stated by Arbitrator Otto J. Babb in the Electric Storage Battery case.[5]

> The company rules, although not the result of collective bargaining, cannot for that reason be set aside, unless they violate the contract. . . . The company has pointed out that the management clause permits and requires it to have rules as a means of exercising proper control of its employees. This position must be sustained by the arbitrator unless he wishes to go beyond his authority and abolish the management clause.

Perhaps the strongest reflection of the "residual rights" theory was in the National Biscuit Company case,[6] where the company had discharged an "accident prone" employee, the evidence consisting of a large number of visits to the first aid room following minor accidents and a slow and complicated recovery from a more serious mishap. There was nothing specific on this point in the contract, but management, in answer to the union's grievance, asserted its right to invoke a new rule (that accident prone employees may be fired) on the basis of a standard management rights clause. Arbitrator Carroll R. Dougherty upheld the company, and in doing so, went a good deal further than most arbitrators in supporting the "residual rights" theory of contract interpretation.

> Article 16, Sections 1 and 2 implies, in the words "direction of the working forces" that the company's management has the right to discipline employees for just cause, subject to the rights of the union and its members as set forth in the agreement. *But even if these paragraphs were not contained in the agreement, the above words would hold true, for it is a settled rule of contract interpretation that management retains and possesses all rights and prerogatives which are not abrogated or modified by agreement or governmental action.* [Emphasis supplied.]

The reasonableness of newly promulgated rules was *not* upheld, however, despite strong management rights clauses, where arbitrators deemed them in violation of specific limitations on management authority expressed elsewhere in the collective bargaining agreements.

Arbitrator George H. Hildebrand held[7] that where the collective bargaining agreement listed four grounds for discharge, the management rights clause of the contract did not permit the addition of a fifth reason (physical disability).

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5. *Electric Storage Battery*, 16 LA 118.
6. *National Biscuit Company*, 26 LA 494.
7. *Pacific Press, Inc.*, 26 LA 340.

The Application of Rules

An effort to discipline employees for some misconduct has an immeasurably better chance of being sustained in arbitration if the offense represents a violation of an established rule than if it is based only on management's "residual rights." That is perhaps one reason why rules are promulgated, although not by any means the only reason. Mere promulgation of rules is not by itself a solution to the problem of enforcing discipline, for those rules must meet several tests, including reasonableness, uniformity of enforcement, adequate notice to employees and consistency of the penalty with concepts of "progressive discipline."

One of the cardinal principles which arbitrators invariably adhere to is that where management bases some disciplinary action on an alleged breach of a rule there must be evidence 1) that the rule really existed, and 2) that the employees were aware of it.

There is the somewhat dated but still applicable case of a wholesale drug salesman employed by Norwich Pharmacal Co.,[8] who found a buyer for a drug store owned by a customer of his. When he had to sue to collect his commission, Norwich Pharmacal found out about it and discharged him for violating the unwritten rule that employees may not participate in such transactions. Arbitrator Mitchell M. Shipman drew a distinction between acts which are wrong *per se,* such as "stealing company property," in which case notice may be unnecessary, and acts which are not in themselves wrong, in which case they cannot be forbidden without express notice.

> In arriving at this conclusion, the arbitrator does not intend to imply thereby that the company has no right to establish a rule prohibiting its salesman to accept a brokerage commission from sales of drug stores. . . . If such a policy is necessary for the efficient and successful operation of its business, the company would have a clear right . . . to establish the rule prohibiting the acceptance of brokerage commissions. This is not an issue here, however. As a matter of fact, had the company made such a rule, the arbitrator would still be unable to find that Tanner had knowledge or notice of such a rule or policy at the time he sued Levine and accepted brokerage commission from him. And, in the absence of such a finding he is, in turn, compelled to find no "just cause" for Tanner's discharge.

8. *Norwich Pharmacal Co.,* 5 LA 536.

There is an inherent weakness in an "unwritten rule" if it deals with matters which do not necessarily occur to employees as falling within the employment relationship; furthermore, such unwritten rules are the very kind that are apt to be revealed to employees only after their first violation.

Even the existence of a rule in printed form does not insure the employer against arbitrator censure if the criteria of clarity and proper timing are missing. Thus a company which had a rule against "defacement of company property" could not sustain discharge of employees who "smeared" a masonite wall with greasy fingers.[9] Nor did management fare much better when it posted a company rule "to become effective immediately." The arbitrator[10] insisted that employees may still have to be given time to get into substantial compliance.

Semantics can play an important role in arbitrations of rule violations. Often, past practice tends to assign certain meanings to words different from the ordinary meanings. At North American Aviation, Inc.,[11] there was a rule that employees were to remain at their work stations until the end of their shifts. It was the habit, nevertheless, of many to wash up early and congregate around the time clock waiting for the whistle to blow. Management decided to strengthen the warning to employees and distributed this memorandum:

> It has been noticed that *some* employees are quitting work prior to the end of their shift. All employees are to remain at their place of work until the close of shift. Any further infraction will result in disciplinary action. Your cooperation will be appreciated.

Following distribution of this notice, several employees were disciplined for visiting the toilet within a few minutes of quitting time. At the arbitration, it appeared that the employees never understood this to be an absolute bar to using toilet facilities during the few minutes before lunch period and before quitting time, nor did management intend it to be an absolute bar to such use. Arbitrator Michael I. Komaroff said that the notice lacked the necessary definiteness to overcome the impression that restrictions on leaving the place of work did not apply to visits to the wash room. The disciplinary actions were not sustained.

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9. *Trane Co.*, 12 LA 559.
10. *American Monorail Co.*, 27 LA 500.
11. *North American Aviation, Inc.*, 19 LA 183.

The Rule of Reason

A rule which subjects an employee to humiliation will usually not be deemed reasonable. In Detroit Gasket & Mfg. Co.,[12] the company instituted a rule that employees could have a total of 48 minutes a day for relief. This was to cover their 10-minute coffee break and the two 5-minute washup periods and would allow 28 minutes for personal use. The employees were notified to mark the times of leaving and returning from relief on a sheet on the foreman's desk. If they failed to register, or if they exceeded the maximum time allowed, they would be subject to discipline. The union charged that the rule was not reasonable; the company claimed it was.

The arbitrator said the rule was an invasion of privacy, for such a registration system involves the "prospect of employees and their supervisors spending substantial amounts of time in rehearsing the details of an employee's washroom habits." The arbitrator ruled that the rule was unreasonable.

Another case in which a rule was found not unreasonable in itself but only in its application to a given situation, was that of the Pet Milk Co.[13] The rule in question required men to notify management when they switched shifts. One employee who was going to be 45 minutes late got another to take his shift. Neither notified the company and the absent man got fired for it. But Arbitrator Charles G. Hampton noted that if the aggrieved had just failed to report for work without notifying the company or getting his job covered by someone else, he would have gotten no more than a warning notice. Under the circumstances, discharge was unreasonable.

Where a rule is intended to protect employees and property against a serious hazard, arbitrators are more inclined than they otherwise would be to overlook inconsistencies in enforcement and inequalities in penalties.[14]

Thus, at the Columbia Rope Company,[15] a discharge was upheld for smoking in a no-smoking area despite the fact that there was only circumstantial evidence against the aggrieved, because there was a

12. *Detroit Gasket & Mfg. Co.*, 27 LA 717.
13. *Pet Milk Co.*, 13 LA 551.
14. See *U.S. Rubber Co.*, 10 LA 50, where Arbitrator Whitley P. McCoy said that past laxness in enforcing a safety rule would not prevent a heavy penalty for violation after management has announced that the days of lenient treatment in this respect were over.
15. *Columbia Rope Company*, 7 LA 450.

serious reason for enforcing that rule strictly.[16]

In James Vernor Co.[17] the employee did not escape discharge despite seventeen years of satisfactory service. An operating engineer and also president of the union local, he was found asleep at his post, and under the influence of liquor. The latter was a dischargeable offense under the contract and he had been warned about sleeping on the job. The main reason for the arbitrator's upholding the discharge, though, was the engineer's failure to remain alert to his grave responsibility for the safety of equipment and employees.

Conflict of Rules

Often, an employee committing some indiscretion will be in technical violation of more than one rule. The question then is which one applies, for different rules may call for different penalties. Under such circumstances, arbitrators apply the rule that seems more "reasonable". Thus, at the General Tire and Rubber Co.,[18] an employee thought the contract gave him the right to refuse a Sunday assignment. It did not, and he was punished under a rule forbidding "disobedience to proper authority." That was wrong, the arbitrator said. He should have been punished more lightly under a rule governing unexcused absences.

A group of employees of North American Aircraft Corp.,[19] on the other hand, discovered that when they stopped work *en masse* to present a grievance to the personnel manager they were not breaking a minor rule, as they expected, but the major rule forbidding interference with plant discipline. They argued that the company only invoked that rule to justify a heavier penalty, but Arbitrator Michael I. Komaroff said:

> The Impartial Arbitrator is not required to analyze the subtle problem suggested by the Union in all its details. It is sufficient to know that the acts of the employees in going to Dehler's office and to Labor Relations *en masse* were *in themselves* an

16. For an almost identical case see *Standard Oil Co. (Indiana)*, 19 LA 665. See also Baltic Metal Products, 8 LA 782, where Arbitrator Sidney L. Cahn reinstated a man discharged for smoking in the plant because it was an obvious attempt by the employer to escape his obligations in a discriminatory layoff. But in awarding reinstatement, Mr. Cahn said: "Ordinarily, in cases of violation of the no smoking rule in plants operating with combustible material, the undersigned would sustain a discharge unless there existed very extenuating circumstances. Here the undersigned finds that such extenuating circumstances do exist."
17. *James Vernor Co.*, 20 LA 50.
18. *General Tire and Rubber Co.*, 6 LA 918.
19. *North American Aircraft Corp.*, 19 LA 712.

interference with plant discipline. The grievance procedure does not provide for this manner of presentation of grievances, but specifically limits the persons who may represent a grieving employee. . . . This deliberately irregular pursuance of a grievance was in itself an interference with plant discipline.

Past Practice in Rule Enforcement

The most important single reason for reversals of management, or at least reduction of penalties, is evidence that the rule the grievant was supposed to have breached has been systematically overlooked by the employer. Even as early as the Allen Wood Steel Co. case,[20] this issue was a thorny one in arbitration. An employee who was not authorized to do so undertook to move a crane. When he damaged it, management gave him a five-day layoff since what he did was directly contrary to an established rule. But Arbitrator Brandshain said that the company could not "condone and wink at" violation of a safety rule and then suddenly crack down on an employee without warning.[21]

Similarly, at Allis Chalmers Co.[22] there was a rule that when an employee runs out of work he is to get more given to him by a foreman and may not take any by himself. But this rule had been widely ignored in the past, and Arbitrator Peter M. Kelliher, who had before him the case of a man disciplined for breaking the rule, said: "The Company cannot, over a long period of time, condone a violation of a plant rule and then impose discipline when a known violation results in loss or inconvenience." And the same finding resulted from the Bethlehem Steel Co. case,[23] where an arbitrator reversed discipline for a man who took scrap metal home without permission on a showing that for twenty-five years there had

20. *Allen Wood Steel Co.*, 3 LA 557.
21. The arbitrator said: "The arbitrators are unanimous that the penalty of a five-day suspension should not have been imposed in this case because Caracappa had never been given a warning or reprimand about his repeated violations of this rule. Thus, we have a situation where the repeated breach of the rule, if it existed, established a practice, which the workers may have been justified in believing was proper because of the failure of the employer to enforce the rule. While we do not intend to condone carelessness, there is no clear evidence that it was carelessness or negligence that caused the damage. The mere happening of the accident is not sufficient to establish that Caracappa was negligent in his operation of the crane. There should have been a definite warning given to the men that this rule was going to be enforced, and the rule should have been made plain before the employer 'cracked down'."
22. *Allis Chalmers Co.*, 8 LA 177.
23. *Bethelehem Steel Co.*, 12 LA 167.

been "sort of an honor system" in this respect, with no enforcement.[24]

Arbitrators generally require evidence of deliberate and willful violation of rules, not merely technical, trifling transgressions, before upholding discipline.

Employees at Chrysler Corp.[25] fell into the habit of "inching up" on their wash-up time before lunch, which brought on a warning that layoffs would be handed out to employees who were not at their work stations when the bell rang. Several employees obeyed the spirit of the new directive by not going to the wash room until five minutes before the bell, but they violated the letter by not coming right back to their machines. For this they were given one-week layoffs. The penalty was based on a technicality only, said Arbitrator David A. Wolff, and for that reason it was reversed.[26]

Conclusion

At the "theoretical" level at least, arbitrators are generally among the adherents of the "residual rights" theory. That is, they believe that except insofar as a collective bargaining agreement curtails management's right to promulgate unilateral rules, that right is unimpaired. But they are quick to add that the right must be exercised without infringing upon contractual rights of employees, which, in practice, amounts to a considerable limitation.

In many of the cases in which unions challenge particular disciplinary actions, a preliminary issue is raised as to whether the companies had the right in the first place to establish new rules without

24. For other cases to the same effect, see: *Douglas Aircraft Co.*, 1 LA 350; *Borg-Warner*, 3 LA 423; *Metal Auto Parts*, 6 LA 443; *Bethlehem Steel Co.*, 6 LA 570; *Jacob Rabinowitz & Co.*, 6 LA 762; *Isle Transportation Co.*, 6 LA 958; *Woburn Chemical Co.*, 12 LA 899; and *Lincoln Industries*, 19 LA 489.
25. *Chrysler Corp.*, 5 LA 420.
26. See also *Quaker Shipyard and Machine Co.*, 3 LA 490; *Joy Manufacturing Co.*, 6 LA 430, where it was held that a strong warning is all that is warranted where a violation was not purposeful and "real"; *U.S. Rubber Co.*, 6 LA 557, where discharge was not sustained in the case of an employee who committed a merely "procedural" breach; *Timken-Detroit Axle Co.*, 6 LA 926, where an employee who should have gotten permission from his foreman before leaving the department asked permission of a temporary supervisor instead, and was thereby improperly discharged; *Boeing Aircraft Co.*, 8 LA 302, where an employee was caught dismantling his machine eight minutes before quitting time where the rule called for turning in tools no more than five minutes before the whistle; *Reynolds Metals Co.*, 9 LA 585, where the rule against punching someone else's time card was breached only "technically" when one man took another's card out of the rack for him; and *Atwater Mfg. Co.*, 13 LA 747, where a similar rule on punching cards was breached when one man, arriving for work together with another, punched the time cards for both.

collective bargaining. There is reason to believe, in the face of the almost universal rejection of this contention by arbitrators, that the issue is not really raised seriously by the union. It is more in the nature of an additional argument against the particular action and perhaps a more or less deliberate device for permitting the arbitrator to deny the union's claim "on the one hand" and uphold the grievance "on the other." It does appear to be an almost invariable pattern for the arbitrator to say that the company *did* have the right to establish a rule and then proceed to examine its application in the grievance at issue. It may be that the vigorous language arbitrators use in upholding management's right to make the rule and in affirming the "good intentions" of the employer in that respect are the response the unions expect and look for; they may be more or less conscious devices to appease management in compensation for the blow about to fall when the grievance is examined on its individual merits.

Here management faces the greatest dilemma in enforcing discipline. The careful formulation of a rule, its promulgation throughout the establishment to the point where all employees are fully aware of it, and the application of the rule as uniformly and as fairly as possible are what arbitrators look for. But the presence of these conditions is no guarantee that any particular disciplinary action based upon admitted violation of the rule will be enforced. For what arbitrators usually look for is not literal guilt or innocence of the aggrieved, but the "reasonableness" of the discipline "under all the circumstances."

This may require exceptions to be made for long service employees, special leniency shown to hardship cases, a tolerant attitude toward employees who knowingly violated a rule but had "no malicious intention," and the like. It must be remembered that arbitration is a court of appeal, in a sense, where penalties may be either sustained or reduced, never increased. The full weight of arbitration experience must inevitably bear heavily on management. For to try to administer discipline in accordance with "all the circumstances" as arbitrators see them must result in an uncertain past practice which, in turn, invites further adverse decisions at the hands of arbitrators. Thus, cause and effect become intertwined.

DISPUTE SETTLEMENT IN INTERNATIONAL CIVIL AVIATION

by R. C. Hingorani

Under Chapter XVIII of the 1944 Convention on International Aviation, the Council of the International Civil Aviation Organization is empowered to settle disputes between Contracting States relating to application and interpretation of the Convention.[1] The Convention was signed by the Allied Powers at Chicago in 1944 at the height of World War II. Despite some national motivations, there was general agreement as to the Convention. The articles were generally borrowed from previous Conventions, particularly the Paris Convention of 1919.[2] The Chapter on settlement of disputes is no exception to it.[3]

After ICAO came into existence, its Council was busy framing

1. Article 84 provides for the reference of disagreements to the Council for decision and appeal therefrom to an *ad hoc* arbitral tribunal or to the International Court of Justice. Article 85 provides for a procedure for appointing the arbitral tribunal. Article 86 makes such a decision final. Articles 87 and 88 provide a penalty for non-compliance with the final decision.
2. Article 37 of the Paris Convention dealt with disputes and provided as follows: "In the case of a disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice; provided that, if one of the States concerned has not accepted the protocols relating to the Court, the question in dispute shall, on the demand of such State, be settled by arbitration.

   "If the parties do not agree on the choice of the arbitrators, they shall proceed as follows:—Each of the parties shall name an arbitrator, and the arbitrators shall meet to name an umpire. If the arbitrators cannot agree, the parties shall each name a third State, and the third States so named shall proceed to designate the umpire, by agreement or by each proposing a name and then determining the choice by lot. Disagreement relating to the technical regulations annexed to the present Convention shall be settled by the decision of the International Commission for Air Navigation by a majority of votes. In case the difference involves the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided in the first paragraph of this Article."
3. It may, however, be admitted that the adjudicating power of the Council of ICAO is wider than that of the ICAN under Article 37 of the Paris Convention.

rules and procedures for cases where it was asked to adjudicate between two or more Contracting States. The first of such rules was adopted by the ICAO Council in 1946.[4] However, no occasion arose to invoke them. Consequent to India's case against Pakistan,[5] a working group was appointed in 1952 to prepare new rules to govern the settlement of disagreements by the Council. The Council provisionally adopted such rules on May 25, 1953.[6] These rules, after reception of comments from the Contracting States, were revised by the Legal Experts' Committee in 1956 and finally adopted by the Council on April 16, 1957.[7]

Decision-making power of the ICAO Council is unique.[8] The Council comprises twenty-one representatives of Contracting States elected by the ICAO Assembly every three years. Essentially, its members represent their respective States and thus their actions are often affected by political motivation. Yet as a composite group they are empowered with judicial functions[9] to settle any disagreement between two or more Contracting States. The rules finally adopted, and their practicability, should be judged in this light.

The rules are divided into two categories. The first deals with disagreements relating to the interpretation and application of the Convention or the International Transit and Transport Agreements. The second category relates to complaints causing injustice or hardships to the complaining States.[10]

Differentiation between disagreements and complaints is necessitated due to the relative importance of disagreements as against complaints. The Council is obliged to decide on any disagreements referred thereto.[11] The Council is under no such obligation to de-

4. Doc. 2121, C/1228, of September 24, 1946, reprinted in 2 Arb J. (n.s.) 275 (1947).
5. See Bhatti, Drion and Heller, "Prohibited Areas," 1953 United States Aviation Reports 109; see also C-WP/1169.
6. Doc. 7392, C/962.
7. Doc. 7782, C/898; C-Draft Minutes XXX-10, of May 2, 1957.
8. See Domke, "International Civil Aviation Sets New Pattern," 1 International Arbitration J. 20 (1945); "So significant was its [Chicago Conference] advance . . . that it constitutes for all time a land-mark of progress in the historical annals of international arbitration."
9. For the ICAO Secretariat's Comments, see Ge/RSD/WD #2, of February 14, 1955, p. 8.
10. Such complaints do not amount to violation of any provisions; rather, complaints arise out of exercise of rights by the State complained against.
11. Chapter XVIII of the Convention makes it obligatory for the Council to give its decision. Article 84 of the Convention reads as follows: "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its annexes cannot be settled by negotiation, it *shall*, on the application of any State

cide in the case of complaints.[12] The recommendations made in the case of complaints are not binding on the parties as in the case of disagreements, nor are the Council's findings in relation to complaints appealable, as in the case of disagreements. Above all, disagreement presupposes violation of some provision of the Convention or dispute as to the interpretation of the Convention. A complaint does not arise out of a violation of the Agreements; it only manifests injustice or hardship to the complaining State due to the exercise of rights by the State complained against.[13]

Salient Common Points

Negotiations: The Rules for settlement of disputes, after recognizing the above differences between disagreements and complaints, do provide some common procedures for both. Thus, before any request is filed with the ICAO Council for its decision, it is necessary for the aggrieved Contracting State to try to settle the matter by negotiation.[14] The Council had, therefore, to determine whether there have been negotiations between the parties.[15]

In the disputes referred to the Council so far, however, there has not been a consistant practice. In the Indo-Pakistan dispute, the Indian request mentioned negotiations between the parties before its reference to the Council. The other two disputes—the United States-Czech dispute over the release of the balloons,[16] and the Lebanese-Syrian dispute over compulsory aircraft stoppage at Damascus[17]—did not mention anything relating to negotiations. There could per-

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concerned in the disagreement, be decided by the Council." (Emphasis supplied.) See also Art. 2(2) of the International Air Services Transit Agreement and Art. 4(3) of the International Air Transport Agreement.

12. Complaints are provided for only in the Agreements. Art. 2(1) of the Air Transit and Art. 4(2) provide that "The Council *may make* appropriate findings and recommendations to the contracting States concerned." (Emphasis supplied.)
13. GE/RSD/WD #3, May 6, 1955, p. 3. See also Minutes of Working Group, July 14, 1952, p. 4.
14. Article 2(g) provides that every application must contain a "statement that negotiations to settle the disagreement had taken place between the parties but were not successful." Art. 21 relating to complaints provides the same statement as under Art. 2(g).
15. Provision for procedure of negotiations before the final filing of a request for the Council's decision is the re-affirmation of established practice in international law that parties should settle disputes between them by mutual negotiations. This becomes more necessary in the field of international civil avaiation which involves particularly all the States of the world and where utmost mutual cooperation and good-will is necessary for its successful operations.
16. C-WP/2248, 2350, 2371 and Document 7739-3, 6/894-3.
17. C-WP/2222, May 14, 1956.

haps be two reasons for that. First, the requests were not submitted under Chapter XVIII of the Chicago Convention, and secondly, there was not yet a final adoption of the Rules when the disputes were referred to the Council.

Filing of Application and Reply: In case of failure of settlement by negotiation, the Rules provide for filing of an application stating the relevent facts and the supporting data along with a statement of law and relief sought of the Council. This is followed by notification of the filing of the application to member States in case of disagreement and to the respondent alone in case of complaint. The respondent will then file a counter-memorial in reply to the allegations in the application along with supplementary factual and legal data, if any. The applicant may file a reply to the counter-memorial and this may be followed by a rejoinder by the respondent. The respondent may also file a preliminary objection as to the Council's jurisdiction over the dispute and this may be decided by the Council without going into the merits of the case. The Council then determines whether the request amounts to a disagreement or to a complaint.

Action by Council in Case of Disagreements

After the receipt of the application and the counter-memorial, the Council may either ask for renewed negotiations between the parties or undertake an examination of the matter by itself or through a Committee of five members of the Council. The Council may also, after hearing the parties, entrust any individual or body to conduct an inquiry or give an expert opinion on the technical points in the dispute. This expert opinion will be communicated to the Council and the parties will be duly notified.

The 1953 rules were improved with a provision for inviting expert opinion.[18] The legal experts considered it advisable that any expert opinion be invited only after hearing the parties. Besides, it was also considered desirable that after the expert opinion has been received the parties have an opportunity to give their comments thereto.[19] Hence, it was provided that the expert opinion shall also be communicated to the parties.

18. Article 8 of Doc. 7392 C/862, of May 25, 1953, says: "The Council may, at any time during the proceedings order an investigation of any question of fact or any question requiring expert advice at issue in the proceedings."
19. See Experts' opinion in their report to Council-Vide Document C-WP/2271 October 15, 1956, p. 5, para.(h).

The Council may also admit any evidence in addition to that given in the pleadings. Such evidence would, however, be in writing. Oral evidence can only be accepted in an exceptional case. All these functions of the Council may be exercised by the Committee appointed for that purpose by the Council. Such a Committee will submit its report to the Council as well as to the parties who may give their observations upon the Committee's report.

There was controversy as to the value of the Committee's report. The ICAO Secretariat was dubious of the Council's competence to delegate its judicial functions to a small Committee.[20] The Secretariat visualized a situation where a small Committee might be asked to report on a particular matter, but it did not consider desirable the delegation of judicial functions. This stand was supported by the United Kingdom and New Zealand.[21] However, its value is enhanced by Article 15 of the Rules. It provides that "after consideration of the report of the Committee. . . . . , the Council shall render its decision". Of course, it is admitted that the Council may make further inquiries after the receipt of the Committee's report but it should be remembered that the Committee would comprise five membrs of the Council and it will be very difficult for the other members of the Council to disregard the opinion of their colleagues who happen to be more informed of the matter than the whole Council. The Committee's report, therefore, would affect the ultimate decision of the Council. Such a position, however, is rather desirable because a small group of Council members, instead of the whole Council, would study and investigate the matter and would submit a report with a summary of the evidence, findings of facts and recommendations. The Council members as a whole will be further enlightened by the observations of the parties. The joined effect of the report and the observations thereon will put the Council members in quite an informed position, thus enabling them to give an opinion which would form a judicial decision.

Intervention: The Rules also permit any member State to join the proceedings if "it is party to the particular instrument, the interpretation or application of which has been made a subject of a dispute under these Rules, and is . . . . . directly affected by it." This poses a problem as to who is "directly affected" by a given dispute.

There were three viewpoints prevalent in the working group.

20. GE RSD WD #2, February 14, 1955, p. 8.
21. C-WP/1685, March 16, 1954, Appendix "A".

They were as follows: (1) In case of a dispute relating to the application or the interpretation of an instrument, any member may intervene; (2) intervention by disputants only; and (3) intervention by affected parties.

Mexico and Canada were in favor of the first proposition. According to them every Contracting State has equal interest in the interpretation of the Chicago Convention irrespective of the fact that the dispute does not concern it immediately or because it has little or no aviation.[22] As the Canadian delegate said: "States should be in a position to protect their interests in order to ensure as far as possible that there will not be bad interpretation."[23] This protection becomes necessary because any decision given by the Council would establish a precedent binding upon all member States on the same point.[24]

The Chairman of the Working Group during the 1953 session was of the opinion that intervention implied existence of two cases which were sought to be joined into one by means of intervention.[25] The United States delegate stated the third view as follows: "It seems to us that in most cases it will be possible to draw a line somewhere. Everybody who is a party to the instrument automatically will have an interest in the matter, but some are more directly affected by interpretation and application than others. In some case where there is a general question of some article, everybody may fall within this category. In other cases of a special nature, perhaps only one, two, three or five States are directly affected. They should have to make some proof to Council that they have the right to intervene."[26]

The perusal of the above three proposals will show that while the first suggestion is too wide, the second one is too narrow; the third one seems to be better than the other two. Therefore, any member State which considers itself directly affected—as Afghanistan was in the Indo-Pakistan dispute[27]—can request the Council's permission to join the proceedings. The Council may, however, refuse such a permission if it is satisfied that there is no reason for granting

22. Minutes of the Working Group's session of December 10, 1952, pp. 11 and 12.
23. *Ibid.*, p. 14.
24. Proceedings of May 14, 1953, p. 2.
25. *Ibid.*, pp. 4-5.
26. *Ibid.*, pp. 7-8.
27. GE RSD WD #4, of May 5, 1955, Appendix "A"; Afghanistan joined on June 18, 1952.

it. Intervention, of course, is automatic if the parties do not object to it.

Intervention by a third State poses a problem as to the time for such an intervention. Article 19 of the Rules provides for no time limit for such an intervention. Nor is any clue given thereto in the minutes of the Legal Experts' Committee. In the Indo-Pakistan dispute, however, Afghanistan joined the proceeding after Pakistan had submitted the counter-memorial and the Working Group had been appointed. But the Afghan case does not establish any precedent. Under the circumstances, it is desirable that intervention should be made at an early opportunity. This can be achieved if the Secretary General of the ICAO, after consulting with the Legal Bureau, notifies all the probable parties and fixes a time within which a Contracting State may file a declaration of intervention. This period could be one month after the submission of the counter-memorial by the respondent.

Decision

The Council may settle the dispute ex parte or after hearing the parties. Any decision given by the Council shall be by its majority accompanied by the reason for such a decision.

There are obvious difficulties. The structure of the Council is political rather than judicial and this was well recognized by the Legal Experts' Committee.[28] These political motivations were slightly visible in the Czech complaint relating to floating of uncontrolled balloons[29] as well as in the Lebanese complaint against Syria.[30] It was on this account that the Mexican delegate had recommended a ballot vote in order to avoid political considerations.[31] Aboslute separation of political considerations from the decision of the Council, however, is not possible. What is possible, of course, is that the ICAO, being a specialized organization in civil aviation, will find that many of

28. The Chairman of the Committee recognized the fact that a member of the Council may ask his State as to what stand should be taken; see Minutes of December 8, 1952, afternoon proceedings, p. 6. The Canadian delegate, Mr. Booth, also recognized the fact that in case of voting it will be Canada which is exercising the vote and not Mr. Booth. (P. 7, *ibid.*) See also the remarks of July 14, 1952, p. 31, for the Mexican delegate's remarks to the same effect.
29. See Council Resolution of June 14, 1957.
30. In the Syro-Lebanese dispute Egypt declared to abstain as it was a dispute between two Arab States, Doc. 7699-11, C-892-11, of November 20, 1956, p. 156.
31. Minutes of the Legal Experts' Committee, of July 15, 1957, pp. 14-15.

the disagreements and complaints involve technical rather than political issues. Besides, if the Council gives any politically inspired decisions, the aggrieved party will have a right to appeal.

There is also a problem as to the size of a majority required for a valid decision. Article 52 of the Chicago Convention provides that Council decisions "shall require approval by a majority of its members." This would mean a majority of at least eleven members out of twenty-one. Cases may, however, occur when some members of the Council are party to the dispute. They and others may abstain from voting on a variety of grounds. As a consequence, the Council decision may not be by a majority of eleven members.[32] The first solution to this problem may lie with the suggestion of Dr. Loaeza of Mexico. He proposed that Council members who are party to a dispute should not be considered members of the Council for a particular dispute and the decision by the Council should be by majority of the remaining members. The second solution could be to require a majority of the Council members present at the time of decision. The third could be a simple majority.

From among the three solutions the first seems more compatible with Article 52 of the Chicago Convention, because under the Conveneion as well as under the Rules an interested member of the Council is prevented from participating and voting in the decision.[33] Because the Council membership may vary in each case, the decision should be by majority of those who are competent to vote.

The anomaly may occur that a Council member directly affected by a given dispute may not choose to intervene. Such an instance may have occurred in the Indo-Pakistan dispute. That dispute could have been brought by Afghanistan against Pakistan. For hypothetical purposes, India, then member of the Council, may have chosen not to intervene. Would India or some other Council member in a similar situation be entitled to vote? Article 84 of the Chicago Convention and Article 15(5) of the Rules only prevent such a Council member from voting who is "party" to the dispute. This would mean a formal party to the proceedings. A solution to this problem would be difficult. The Council may be empowered to determine if any Council member is interested in the proceedings. But any such determination

32. A typical example may be taken with respect to Joint Finance Agreements with Iceland and Greenland in which about eight members of the Council are involved. What happens if there is disagreement over a joint financing scheme?

33. Art. 84 of the Chicago Convention and Art. 15(5) of the Rules; see also C-WP/2271, of October 10, 1956, p. 6, para. 7(a).

may amount to censure of the member. Else the member may be allowed to vote.

Appeals

The decision of the Council is appealable[34] within 60 days of receipt of notification of the Council decision. This implies that appeal shall not only be filed within 60 days from the date of communication of the Council decision to the appellant but also that filing of such an appeal shall be reported[35] within sixty days to the Secretary General.

The provision creates a limitation which the Council may have the power to determine. The Council is also authorized to extend the period of limitation. Presumably, it may permit appeal to be filed after the sixty day period. Whether this will be compatible with the mandatory provision of Article 84 of the Convention—which prescribes a sixty day limit only—is hard to say. However, since the rules are made in pursuance of the Convention, the latter will supersede the former when the two are inconsistent.

The appeal, however, can be filed either before the International Court of Justice or before an *ad hoc* arbitral tribunal. This can be done conveniently before the International Court within the limited period of sixty days. Filing of an appeal before the *ad hoc* arbitral tribunal may, however, raise some problem as to time limitation. It is feared that choice of arbitrators may take some time and Art. 85 of the Chicago Convention itself contemplates five months for the purpose. If this is so, before whom could the appeal be filed? Presumably, the appeal could be filed with the ICAO Secretary General for purpose of transmission to the *ad hoc* tribunal to be established. But this is neither implied from Article 85 of the Convention nor provided for in the Rules.

The Chicago Convention established a procedure for an *ad hoc* tribunal. Primarily, the parties concerned are allowed to choose the personnel of such a tribunal. When they fail to do so, each party, and probably also the intervener, is empowered to appoint an arbitrator and the arbitrators so appointed will select an umpire. If no agreement is reached on the selection of an umpire or if no arbi-

34. Art. 84 of the Chicago Convention and Art. 68 of the Rules.
35. Notification of the appeal to the Council through the Secretary General is necessary in order to stay execution of its decision or to submit a record of the proceedings to the International Court of Justice or the arbitral tribunal. GE RSD WD #3, of May 5, 1955, p. 12.

trator is appointed by a party, the President of the Council is authorized to appoint the umpire or the arbitrator as the case may be. Any arbitral tribunal, so established, will fix its own procedure except when it makes undue delay in doing so in which case the Council is authorized to determine procedure for the tribunal. The International Court of Justice or the *ad hoc* arbitral tribunal will decide the appeal by majority.

Binding Nature of Decision

Under art. 86-88 of the Chicago Convention, the decision of the Council, unless appealed against, is binding upon all Contracting States including parties to the dispute. The decision of the International Court of Justice or the *ad hoc* arbitral tribunal is also binding. The decision may be enforced in the case of a defaulting Contracting State by withdrawing its voting power in the Assembly or in the Council or/and by obliging the Contracting States to prevent the defaulting airline through their airspace. The latter penalty arises out of an assumption that in most cases an airline, if any, will be the defaulter and, therefore, it should be prevented from operating for its continued breach of the Chicago Convention and its disregard of the final decision.

Art. 88 of the Convention whereby "The Assembly shall suspend the voting power in the Assembly and in the Council of any Contracting State that is found in default under the provisions of this Chapter," provides for a two-fold penalty: one for the defaulting Contracting State party to the disagreement and the other for a Contracting State which permits the operation of the defaulting airline through its airspace. Its wording being of a mandatory nature, it could be implied that there would be an automatic suspension of the voting right of the defaulting Contracting State. By this interpretation the Assembly will have no other choice than to apply the sanction. But what happens if the Assembly, which is a political organization, does not intend to pass sanctions against the defaulting State? Such a situation could well be imagined in a political organization where diplomacy rather than sanctions prevails. The Assembly should have been given more freedom of action in achieving the desired purpose. Therefore, it is submitted that Article 88 be applied only to the effect that suspension take place only "on recommendation of the Council", and that such other action for implementation of the final decision may be taken.

Complaints

Complaints as differentiated from disagreements are given less importance. After preliminary determination by the Council as to the category of a given request, a Committee of five Council members shall be appointed to inquire into the matter in consultation with the parties. Consultation with parties is desired as a step toward conciliation. The Committee will submit a report as to such an attempt at conciliation or include its findings in the report in case of failure of settlement. After the receipt of the Committee's report, the Council *shall* record the settlement or else *may* make appropriate findings with reasoning therefor. Unlike disagreements, rules relating to complaints do not provide for intervention.[36]

Appraisal

The rules relating to settlement of disputes by the ICAO Council form an important document finally adopted after five years of labor by legal experts. They deal essentially with two forms of requests, namely, disagreements or complaints as contemplated under the Chicago Convention and the International Transit and Transport Agreements of 1944. No provision is made for the settlement of bilateral agreements which make the ICAO Council an arbitral authority.[37] There was some discussion over bilateral agreements among the legal experts, but it was understood that the Council should make *ad hoc* arrangements for the same after consultation with the parties.[38]

A State which prefers to refer any disagreement or complaint to the Council has to fulfill a few conditions. It should be a Contracting State to the Convention or the agreement involved and should have some disagreement as to the interpretation or application of the Convention or inconvenience caused to it by the exercise of a right by another Contracting State. There is also emphasis on negotiations prior to the filing of the request. Once a request has been filed, it may be entrusted to a smaller group of Council members who may sponsor negotiations between parties if prior negotiations were either inadequate or there appear to be fair chances of achieving settlement by such process. Oral proceedings should be

36. Legal Experts Meeting, of December 10, 1952, p. 15.
37. There are about 1200 bilateral agreements filed with ICAO and most of them provide that any dispute arising therefrom shall be sent to the Council for advisory opinion in some cases and arbitration in other cases.
38. Minutes of the Legal Experts Meeting, of May 12, 1953, p. 1.

avoided as far as possible. This aspect of the rules is different from judicial proceedings in which oral hearings are essential. Article 33 of the Rules providing for their suspension emphasizes the flexibility of the Rules to meet different situations.

The Rules substantially follow the provisional rules of 1953. There are, however, a few important departures from them with respect to interpretation and revision.[39] Under the 1953 rules, it was provided that parties could ask the Council for an interpretation of its decision. Article 19 of the Rules provided for revision of its decision by the Council on the request of the party within six months from the date of discovery of the new fact. Such a revision was possible only if the time for appeal had expired and the Council decision had become final.

Provisions relating to interpretation and revision in 1953 Rules had no equivalent in the 1946 Rules. They were, however, borrowed from the Rules as provided by the International Court of Justice and the recommendation of the International Law Commission in its 1952 Draft Convention on Arbitral Procedures. However, the legal experts Committee entrusted with the framing of the Rules considered it desirable to delete the above provisions from the 1953 Rules in view of the advice of the Legal Bureau that the contemplated powers of revision and interpretation were outside the scope of Chapter XVIII of the Chicago Convention.[40]

Except for the above deviations, the Rules have been framed after an extensive study of the provisional Rules and the procedures of the International Court of Justice and the Draft Convention on Arbitral Procedure. They, therefore, represent an attempt on the part of the legal experts to make the Rules as judicial as possible. Time alone will show the measure of their workability.

39. Doc. 7392, C/862, Art. 19 & 20.
40. C-WP/2271, p. 5(a).

EDITORIALS

(*Continued from Page* 2)

devoted to study and writing the award. A recent research report of the Association showed, further, that in more than 60 percent of the cases the arbitrator's fees totaled between $100 and $300. More than $300 was charged in about a third of the cases; in fewer than one percent was less than $100 charged.

Whether it was altogether wise or necessary for parties to concentrate all available arbitration work in only a few hands is no longer relevant. The fact is that this is what *has* happened. The trend has prevailed despite unceasing attempts by the American Arbitration Association to encourage the use of new arbitrators. Indeed, although the Association has sought to educate new arbitrators and to encourage parties to select them, these measures have had little or no effect on the cost of arbitration. The usual minimum fee of $100 per day is so well established that, even when an arbitrator serves no more than once or twice a year and is therefore not at all dependent upon arbitrating for his livelihood, he is reluctant to commit himself to a lower per diem. Perhaps this is because he does not wish to be thought less competent than the better known arbitrators. In any event, with no significant cost-advantage to be found in selecting new arbitrators, the parties continue to make the busy arbitrators busier. Thus cause and effect inter-act to make the problem ever more critical.

Written Opinions Add To Costs

Another characteristic of labor arbitration, as it has developed during the past decade, also has an important bearing on costs. It has become customary for arbitrators to render, in addition to awards disposing of the grievance at hand, more or less lengthy opinions, written during paid "study time." These documents often cite the pertinent sections of the collective bargaining agreement, repeat the arguments and evidence as presented by each side, and finally describe the reasoning process by which the arbitrator came to his conclusion. As we pointed out in *Arbitration Journal,* Vol. 13, No. 3 (1958), arbitrators also frequently cite awards by other arbitrators in other cases to show that their decisions conform to a general pattern.

There are two sides to this problem. That parties often find opinions useful, particularly where the issue involves contract interpretation, cannot be doubted. Arbitration is an institution created to

meet the needs of parties; if opinions were not often useful, the practice would never have become popular. Thus, while written opinions add to the cost of particular cases, they may provide guide lines for individual companies and unions to follow in administering their collective bargaining agreements. They can thereby tend to reduce future grievances and arbitrations. If the costs of a particular contract-interpretation arbitration were pro-rated over the life of the contract, the cost of an individual case might not appear excessive.

But it is equally true that there *are* occasions when written opinions do not give the parties their money's worth. Opinions are sometimes disproportionately long and repetitive. Indeed, whether overwritten or even of reasonable length, they may be unnecessary when issues are fairly simple in nature.

It may be contended that parties are free, if they choose, to ask the arbitrator for an award only. This is done on occasion. But the fact that parties avail themselves of the privilege so seldom suggests that existing procedures may not make it expedient for them to do so. Perhaps labor and management representatives find the hearing the wrong time and place, psychologically, to impose a restriction on an arbitrator's earning opportunities.

Two Suggestions

As with other matters of arbitration procedure, limitations on written opinions might better be agreed upon in advance, when appropriate. It has been suggested that the Association establish routine procedures by which parties could indicate in advance of a first hearing—perhaps at the time the hearing date is set and communicated to the parties—whether or not they want written opinions. Under this plan the Association could report the wishes of the parties to the arbitrator, so that neither side would have the uncomfortable feeling of having taken the initiative. The arbitrator who was asked to write an opinion might still require "study time," but it would surely be shortened considerably. This plan seems deserving of discussion; on its face, it appears practical and realistic. It may be more fruitful of results than the sometimes-tried device of limiting the number of "study days" while still expecting an arbitrator to write an opinion.

Another suggestion has been made on which we would welcome the opinions of members, clause users and *Arbitration Journal* readers. This is that there be new expeditious procedures, perhaps with a special calendar and docket, for what might be called "small claims"

arbitration cases. These would be elementary grievances, not involving important matters of principle or contract interpretation, but grievances which must nevertheless still be resolved, through impartial arbitration, for the sake of sound labor relations. The proposal assumes that parties to such cases want prompt awards, also without written opinions. An arbitrator appointed through AAA, in a busy metropolitan center, could hear two or three such cases a day at a correspondingly reduced fee, reach his conclusion on the basis of evidence and arguments presented to him, and issue a written award in correct legal form as soon thereafter as possible. There would be no opinions. The advantages to the parties would not only be financial. It would give them deeply-desired speedy decisions. It would also relieve them of that burden of formality which is more appropriate to difficult or important cases.

* * *

So far, because the Association's prime obligation is to them, we have explored the problem from the parties' point of view: that is, with the object of finding ways to ease the financial burden on them. But because labor and management require a corps of professional arbitrators, and because the Association is well aware of the invaluable service that they perform, we must also take into account the economic effect of any plan on the arbitrators themselves.

Effect on Earnings of Professional Arbitrators

Proponents of both suggestions contend that these plans need not operate adversely to arbitrators' interests. Indeed, they may prove beneficial to them over the years. The ready availability of arbitration —informal, prompt and inexpensive—when it is needed in simple cases, would do much to overcome the complaints that parties are directing, increasingly, at arbitrators and at the arbitration process generally. This should, in the long run, benefit arbitrators by justifying higher costs in those other controversies which do, indeed, require extended hearings, briefs and comprehensive written opinions.

Whether these two proposals are feasible or desirable must depend upon the parties, for arbitration is a voluntary practice which exists only by their will and for their convenience. Meanwhile costs can be reduced by the parties themselves, through improvement of their own practices before and during arbitration hearings. Here the American Arbitration Association believes that it can be helpful. A large part of its educational program is directed toward teaching par-

ties to make the best use of hearing-room days, to present facts and arguments to an arbitrator in a manner that will save his time, and to avoid such indiscriminate citation of "precedents" that the arbitrator is compelled to devote more study time to a case than is necessary. The hidden cost of arbitration, like the submerged part of an iceberg, is the largest. The parties can help the arbitrator to keep his fee, and their own expenses, at a reasonable level by paying conscious heed to reducing these hidden costs. The Association can do its part only if they will do theirs.

AAA BEGINS NEW LABOR AWARD REPORTING SERVICE

The American Arbitration Association is beginning a new service to the labor relations community, in the form of a regular bulletin, in which there will appear one-paragraph digests of labor arbitration awards and opinions which parties to those cases have released for publication.

The decision to undertake this new program was made by the Association's Executive Committee following a questionnaire survey conducted by AAA among its members and clause users. The purpose was to ascertain whether parties to labor arbitration cases would like to have the Association make arbitrator's decisions available for study and research and whether they would, in general, consent to such use of awards in their own cases.

The response to both questions was overwhelmingly affirmative. More than ninety-five percent of those who replied indicated that the publication of awards in some form would be a useful educational service, provided that it could be accomplished with due regard to the parties' right of privacy and without stimulating excessive reliance upon precedent.

In view of the response and the Association's educational goals, the Executive Committee approved a publication program limited to labor cases. The staff of the Association has since devised a plan which can be executed within AAA's budget. The four chief elements of the plan are:

1. Parties to each case will be asked whether or not they will consent to the reproduction of awards in that case for general research. It will be made clear that names of any individuals accused

of serious wrongdoing will be omitted, regardless of whether or not the charge was sustained.

2. If both parties consent, and whenever the Association's staff believes the award to be of general interest, a one-paragraph summary will be published, together with the arbitrator's name, the number of pages in the award, and the major industrial classification of the employer. The names of parties will, of course, not be disclosed with the summary paragraphs.

3. These paragraphs will be reported to Association members in a special bulletin, to be called *Summary of Labor Arbitration Awards.* It will be issued at intervals to be determined by experience.

4. *Summary of Labor Arbitration Awards* will be mailed free of charge to AAA members. There will be no obligation on the part of the member to buy the full text of any awards and opinions. However, when the text is desired, it may be bought from the Association, by members and by non-members, at thirty cents per page. It seems probable that most awards will run to less than ten pages each. A convenient order blank will be included with every issue of *Summary of Labor Arbitration Awards.*

In reporting published cases, the Association will caution the researcher that some details must, of necessity, be omitted in the one-paragraph summary; those summaries should be used as an index to the cases, rather than as a substitute for the full text. Readers will be further reminded that neither the digests nor the complete awards necessarily indicate how other arbitrators might rule in apparently similar cases. Each grievance is decided on its own merits. Arbitrators take into account the history of labor-management relations in the establishment, the testimony and demeanor of witnesses, the exact language of the collective bargaining agreement and many other factors, some of which they may not believe it wise to reduce to writing. Consequently, users of the Association's service will be told, no attempt should be made to rely upon these awards as binding precedents in arbitration. The Association makes them available solely for the insight that they may offer scholars, research workers, and management and labor representatives into the general problems of industrial relations.

A complete file of the *Summary of Labor Arbitration Awards* will be kept in New York headquarters and in all AAA branch offices for the convenience of labor and management representatives who are not members of the Association. Members of AAA will, of course, receive the service automatically through the mail.

DOCUMENTATION

AGREEMENT BETWEEN THE FEDERATION OF CHAMBERS OF COMMERCE & INDUSTRIES, PAKISTAN AND THE AMERICAN ARBITRATION ASSOCIATION

regarding the use of arbitration facilities in trade between Pakistan and the United States

The Federation of Chambers of Commerce & Industries, Pakistan and the American Arbitration Association are agreed henceforth to recommend to firms engaged in trade between Pakistan and the United States of America to insert the following arbitration clause in their contracts:

> "Any dispute or claim arising out of or in relation to or in connection with this contract, or for the breach thereof, shall be finally settled by arbitration pursuant to the Pakistan-American Trade Arbitration Agreement, of January 13, 1959 by which each party hereto is bound."

The terms of the agreement referred to in this clause are as follows:

1). If the arbitration is to be held in Pakistan, the dispute shall be submitted to the Arbitration Tribunal of the Federation of Chambers of Commerce and Industries, Pakistan and the arbitration shall be conducted in accordance with the rules of that Tribunal. If the arbitration is to be held in the United States of America, the dispute shall be submitted to the American Arbitration Association, and the arbitration shall be conducted in accordance with the rules of the Association.

2). In the event that the parties have not designated the place of arbitration or are unable to agree thereon within 30 days after the demand for arbitration has been made, the place of arbitration shall be determined by a Joint Arbitration Committee of three members, one to be appointed by the Arbitration Sub-Committee of the Federation, another by the American Arbitration Association and the third of a nationality other than that of any one of the parties to act as Chairman to be chosen by the other two members. In deciding

the place of arbitration, the Joint Arbitration Committee shall consider among others the principle that, if only the quality and/or quantity of the goods is in dispute and/or inspection of the goods is necessary, the arbitration of such case shall take place at the place where the merchandise is located. The party demanding arbitration according as he is resident in Pakistan or the United States of America shall give notice to the Arbitration Tribunal of the Federation or the American Arbitration Association, as the case may be. The Arbitration Tribunal of the Federation or the American Arbitration Association as the case may be, shall request both the parties to submit their arguments and reasons within 30 days for preference regarding the place of arbitration. The determination of the place by the Joint Arbitration Committee shall be final and binding.

3). The Federation of Chambers of Commerce and Industries, Pakistan and the American Arbitration Association each agrees to establish and maintain such International Panels of Arbitrators as may be necessary to carry out the purpose of this agreement, viz, to cooperate in promoting the use of mutual facilities for commercial arbitration between two countries and to advise each other of the personnel of these panels.

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REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

WHETHER PETITIONER CONTRACTED TO ARBITRATE DISPUTES BY ACCEPTING BUT NOT SIGNING CONTRACT WITH ARBITRATION CLAUSE FOR CERTAIN PIECE GOODS SHIPPED BY RESPONDENT TO A PROCESSOR FOR PETITIONER'S ORDER, HELD AN ISSUE THAT CAN BE DETERMINED ONLY UPON TRIAL. Petitioner alleged that it negotiated with respondent on the basis that if the Navy did not agree there would be no contract. Respondent shipped certain goods to a third party for rubberizing, noting that they were part of petitioner's order. The petitioner sent back, unsigned, respondent's contract forms and objected to the price. It was alleged that the matter of price was worked out and the contracts sent again to the petitioner who neither signed them nor sent them back. The court said: "The receipt and retention of a contract form containing all the terms of the proposed agreement, including an agreement to arbitrate, without anything more would not be sufficient to force the parties to arbitrate. However, if after receiving the contract and not objecting to its terms, further deliveries were reecived pursuant to the contract, a contract might well have arisen and the agreement to arbitrate would be binding. . . . All the facts outlined . . . leave in doubt the one important question—whether the parties actually did contract or not." *Garrett Corp. v. Frank Ix & Sons New York Corp.,* N.Y.L.J., October 22, 1958, p. 12, Epstein, J.

DIAMOND DEALERS CLUB BY-LAWS PROVIDING FOR ARBITRATION BETWEEN MEMBERS HELD NOT APPLICABLE TO DISPUTE BETWEEN PARTNERSHIP AND CORPORATION DESPITE MEMBERSHIP OF INDIVIDUALS IN CLUB. The president and secretary of the corporation and one of the plaintiff partners held membership in the club. The court stated the "*members* must be natural persons under . . . the by-laws and they contain no provision for extending their application to partnerships or corporations in which their members have an interest. . . ." *Adler v. R. & M. Diamond Corp.,* N.Y.L.J., September 23, 1958, p. 11, Hogan, J.

COLLECTIVE BARGAINING AGREEMENT HELD NOT TO BE CONTRACT FOR PERSONAL SERVICES WHICH WOULD BE EXCLUDED FROM APPLICATION OF PENNSYLVANIA ARBITRATION ACT. Said the court, in affirming the decision of the Court of Common Pleas, Allegheny County (30 LA 59): "The 'personal services' exclusion can only be taken to apply to the employee's own contract of employment; otherwise construed, would be to write into the meaning of a collective bargaining agreement something never intended by the parties." *Amal. Assoc. of Street, Electric Railway and Motor Coach Employees of America, Div.* 85 *v. Pittsburgh Railways Co.*, 30 LA 477 (Pennsylvania Supreme Ct., W.D., Arnold, J.).

DESIGNATION OF ARBITRATOR AND PARTICIPATION IN HEARING HELD WAIVER OF CLAIM THAT ARBITRATION AGREEMENT DID NOT CONSTITUTE A CLEAR AND UNEQUIVOCAL MUTUAL PROMISE TO ARBITRATE. The clause had stated that "arbitration, if any," was "to be held in New York." In reply to a party's contention that the agreement was not binding, the court said: "This contention is without merit in view of the express provision in the contract relative to arbitration and respondent's conduct in designating an arbitrator and attending the hearing. Under these circumstances the respondent cannot now question the validity of the arbitration clause and is estopped from raising the jurisdictional issue as to the subject matter." *H. V. B. Smith v. Polar Cia de Navegacion, Ltda*, 181 N.Y.S. 2d 368 (Jacob Markowitz, J.).

TERMINATION OF DUTIES OF IMPARTIAL CHAIRMAN UNDER TERMS OF A COLLECTIVE BARGAINING AGREEMENT DOES NOT TERMINATE ARBITRATION CLAUSE WHICH PROVIDES FOR RENEWAL OF HIS TERM OR DESIGNATION OF A SUCCESSOR BY THE CONTRACTING PARTIES. The trade association and the union, parties to the agreement, designated the State Mediation Board to name an arbitrator in place of the originally designated person who was no longer available. The court said: "It is clear that the parties intended the arbitration clause to be operative throughout the term of the collective bargaining agreement whether Mr. Shapiro remained as Impartial Chairman or not. The provision for the designation of a successor to Mr. Shapiro, should his term not be renewed, emphasizes this purpose. The arbitration clause was in no sense so bound up with Mr. Shapiro that it may not survive the end of his term as Impartial Chairman." *Application of William Faehndrich, Inc.*, 181 N.Y.S. 2d 918 (Hofstadter, J.).

COURT REFERS TO REFEREE QUESTION OF WHETHER PETITIONER IS SUCCESSOR IN INTEREST TO ORIGINAL PARTY TO CONTRACT. The court said: "A grave question is raised whether the petitioner is the successor in interest of . . . one of the parties to the contract in dispute. If it be established that the petitioner is such successor, it would be bound by the terms of the contract and would not be entitled to the relief herein sought [stay of arbitration]." *Empire Precision Metal Parts, Inc. v. Local* 3, *Production, Maintenance & Service Employees Union*, N.Y.L.J., November 20, 1958, p. 14, Martuscello, J.

APPELLATE DIVISION AFFIRMS ORDER STAYING ARBITRATION, HOLDING THAT DISPUTES WITH SUBCONTRACTOR WERE EXCLUDED FROM ARBITRATION, when provision for their determination was made in another part of the agreement. *Merritt-Chapman & Scott Corp. v. Baridon*, 7 A.D. 2d 627, 179 N.Y.S. 2d 187 (First Dept.).

II. THE ARBITRABLE ISSUE

WHETHER PAYMENT WAS MADE WITHIN THE 10-DAY GRACE PERIOD ON A SHIPBUILDING CONTRACT HELD NOT TO BE A CONDITION PRECEDENT TO A CONTRACT BUT AN ARBITRABLE ISSUE UNDER A BROAD ARBITRATION CLAUSE. The dissent contended that the contract did not become operative as a result of the delay in payment. However, the majority of the Appellate Division held that "here the integrity of the contract is challenged not on grounds extrinsic to the terms of the contract such as fraud or illegality, but because of failure to perform one of its terms. The parties have agreed to leave to arbitration 'any dispute arising under or by virtue of this contract', and that, we believe, necessarily includes a dispute as to whether the buyer has duly performed pursuant to the contract the prescribed condition of initial payment. The signed agreement imposed mutual obligations on the parties and these were absolute ones, for the builder 'agrees' to obtain and desposit with a Japanese bank, specified documents and within ten days after notice thereof the buyer 'shall' make the initial payment. The parties having thus assumed these obligations there immediately came into being a binding contract and the arbitration clause became immediately operative." *Uraga Dock Co., Ltd. v. Mediterranean & Oriental Steamship Corp.*, 6 A.D. 2d 443, 179 N.Y.S. 2d 474 (First Dept.).

ISSUES RAISED BY DEADLOCK OF TRUSTEES OVER THE PROPOSAL THAT PENSION FUND BECOME A SELF INSURER HELD TO BE AN ARBITRABLE ISSUE WITHIN THE CONTEMPLATION OF SECTION 302 TAFT-HARTLEY ACT AND THE ARBITRATION CLAUSE. The trust agreement provided that in the event of a deadlock "upon any question coming before the trustees for decision" and upon their failure to agree on an umpire, the court will appoint one. The employer trustees contend that the trust agreement contained no authority for self insurance and that an umpire would in effect be rewriting the agreement. In rejecting this contention the court said: "There is no doubt that there is a deadlock between the two groups of trustees on each of the issues raised here by the respondents. These issues include not only the wisdom and desirability of the proposal of the Union trustees, but also the construction to be given to the agreement and such questions of law as might impede or prevent the proposal in its present, or in modified, form from being carried into effect. All of them are before the trustees 'for decision'. The agreement provides that any such question shall be submitted to the umpire in the event of deadlock. The province of an umpire or arbitrator comprehends

questions of law and of the construction or interpretation of the agreement, as well as questions of fact or judgment. Such questions are not to be taken from him and determined instead by the court." A petition for the appointment of an impartial umpire was therefore granted. *Barrett v. Miller,* 166 F. Supp. 929 (S.D. N.Y., van Pelt Bryan, J.).

BREACH OF CONTRACT HELD TO BE COVERED BY CLAUSE IN CONSTRUCTION CONTRACT COVERING ALL QUESTIONS THAT "MAY ARISE UNDER THIS CONTRACT AND IN THE PERFORMANCE OF THE WORK THEREUNDER." The court determined that under *Marchant v. Mead-Morrison Mfg. Co.,* 252 N.Y. 284, the term " 'all controversies growing out of' a contract to arbitration, or a 'substantially equivalent' phrase, is authority to assess damages for a breach, but where there is only a narrow authority in the arbitrators to determine questions of *meaning* and *performance* then there is no authority to go beyond these items. The sense of the language used here, however, has much more of the 'all controversies' import." A motion for a stay of the action pending arbitration was therefore granted. *Dias v. De Lillo Construction Co.,* 181 N.Y.S. 2d 258, Christ, J.

GRIEVANCE BASED ON ASSIGNMENT OF SALARIED EMPLOYEE OUTSIDE BARGAINING UNIT TO MACHINIST JOB HELD NOT ARBITRABLE IN ABSENCE OF JOB DESCRIPTIONS IN THE CONTRACT. The court held that under the circumstances an arbitral award would amend, rather than interpret the contract. Under a collective baragining agreement covering tool and die makers and related jobs, the company assigned a salaried technician to a machinist's job. The union brought a grievance under the broad arbitration clause covering interpretation and application of the contract. The court, in rejecting arbitrability, found that the job classification schedule in the agreement did not contain job descriptions and that the union had agreed that "the Company retains the exclusive right to manage its business." Said the court: "The assignment of work to [the] laboratory technician, as set forth in the said grievance was made by the [company] in the exercise of its 'exclusive right to manage its business' and 'to determine the methods and means by which its operations are to be carried on' and 'to direct the work force' as recognized by the plantiff in the [contract]. . . . In order to grant relief . . . an arbitrator would be required to 'add to' or 'detract from' or 'alter' the provisions of the said Agreement, and would be required to establish a 'job classification' in violation of the . . . provisions of the collective bargaining agreement." *Int'l Ass'n of Machinists Lodge No. 912 v. General Electric Company,* 164 F. Supp. 794 (S.D. Ohio, Druffel, D.J.).

DISPUTE OVER CONTRACTING OUT OF MAINTENANCE WORK HELD NOT TO BE AN ARBITRABLE ISSUE WHERE COLLECTIVE BARGAINING AGREEMENT RESERVES MANAGEMENT RIGHTS. The court said: "The labor contract does not prohibit, and is not susceptible of being interpreted to require that defendant is prohibited from contracting out work. The labor contract does not give the plaintiff or any of its mem-

bers or any of the employees of the defendant the right to have arbitrated the question of whether the defendant may contract out work. The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract." *United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Co.*, 168 F. Supp. 702 (S. D. Alabama, Thomas, J.).

DISPUTE COVERED BY ARBITRATION CLAUSE IS ARBITRABLE DESPITE CONTENTION BY ONE PARTY THAT ARBITRATOR'S AWARD MIGHT VIOLATE PUBLIC POLICY. A lower court had held (*Arb. J.* 1958, p. 223, 225) that discharge of employees who had invoked the Fifth Amendment before a legislative body investigating Communist activities was justified as a matter of law and therefore not arbitrable. In reversing, the Appellate Division said: "On a motion to compel arbitration the court may only consider the existence of an agreement to arbitrate and whether there is a dispute arising thereunder. Once such a dispute is established even questions of law are for the arbitrators. This rule comprehends questions involving the interpretation of discharge provisions in employment contracts. In the present status of the arbitration proceeding the court may not consider the question of whether reinstatement would violate the public policy of this State. All that is before the court is unilateral testimony given in another form that the employees were at one time associated intimately with Communist activities. This is coupled with their failure, under claim of privilege, to deny these charges. Such proof does not support the conclusion of law respondents [employers] urge. But even if it did, matters of law are for the arbitrators, as are matters of fact. On whether a supervening public policy might serve to override the rules which ordinarily apply to arbitration and the collective bargaining contract between the parties is not only a premature question, but one on which the record, at this stage, is hopelessly deficient." *Carey v. Westinghouse Electric Corp.*, 6 A.D. 2d 582, 180 N.Y.S. 2d 203.

METHOD AND TIMELINESS OF NOTICE TO REINSURER HELD TO BE SETTLED UNDER NEW YORK LAW AND THEREFORE NOT ARBITRABLE UNDER CONTRACT CLAUSE WHICH COVERS ONLY DIFFERENCES OVER THE INTERPRETATION OF THE AGREEMENT. The reinsurer sought to stay arbitration initiated by the reinsured with respect to the interpretation of the contract. The court said: "The question of the type of notice to an insurer or a reinsurer, and the timeliness thereof, is one well-settled and understood in this industry, as well as in the legal profession. There can be no ambiguity or question of interpretation of the notice clause. . . . The controversy here related deals only with the subject of performance or non-performance of the agreement and not the interpretation of the language of the agreement. This court cannot confer jurisdiction or authority to arbitrators which they do not have under the terms of the agreement." *General Security Assurance Corp. of New York v. Central Security Mutual Insurance Co.*, 14 Misc. 2d 73, 179 N.Y.S. 2d 124 (Klein, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

COURT REFUSES TO STAY ARBITRATION OF WAGE RENEGOTIATION GRIEVANCE WHERE EMPLOYER FAILS TO CLEARLY SHOW THAT ANOTHER CONTRACT CLAUSE "FREEZES" WAGES. The employer contended that the escalator clause was superseded by the clause stating "During the life of this agreement the Employer and the Union agree to try to maintain the present wage standards in the plant." After hearing conflicting evidence the court said: "I doubt very much whether either or both of the parties had any very clear and definite understanding of the precise import of the particular sentence." Therefore the court held that since the burden of proof is on the plaintiff "to establish his case by a preponderance of the evidence," plaintiff had failed to show that the escalator clause was revoked. A stay of arbitration was therefore denied. *Hirsch v. Upper South Department of the Int'l Ladies' Garment Workers' Union, AFL-CIO,* 167 F. Supp. 531 (D.C. Maryland, Chesnut, D.J.).

PENNSYLVANIA SUPREME COURT COMPELS ARBITRATION OF PENSION DISPUTE DESPITE FACT THAT AN AWARD MAY RESULT IN MANDATORY RELIEF, THAT IS, SPECIFIC PERFORMANCE WHICH MIGHT NOT BE ENFORCEABLE UNDER PENNSYLVANIA ARBITRATION STATUTE. *Amal. Assoc. of Street, Electric Railway & Motor Coach Employees of America, Div. 85 v. Pittsburgh Railways Co.,* 30 LA 477 (Penna. Supreme Ct., W.D., Arnold, J.).

EMPLOYER'S DENIAL OF REQUEST OF DISCHARGED EMPLOYEE FOR ARBITRATION DOES NOT GIVE THE RIGHT OF ACTION FOR DAMAGES TO EMPLOYEE AS INDIVIDUAL. Though the court held that an employee is the direct beneficiary of a "no discharge without cause" provision in the collective bargaining agreement, nevertheless he is bound by and limited to the provisions of the agreement which indicate that the employee "has entrusted his rights to his union representative. It may be that the union failed to preserve them." Referring to *Donato v. American Locomotive Corp.,* 306 N.Y. 966 (digested in *Arb. J.* 1954, p. 55), the Court of Appeals in affirming dismissed the claim for damages. *Parker v. Borock,* 5 N.Y. 2d 156 (Burke, J.).

PUBLIC ADMINISTRATOR MAY ENFORCE ARBITRATION OF INTESTATE'S CLAIM ARISING OUT OF A CHARTER PARTY. The court held that the "argument that the contract to arbitrate was personal to [intestate] and died with him . . . is not sufficient to bar the relief sought. There was nothing in the relations between the decedent and the respondent which would sustain the conclusion that the parties intended the charter party to be a personal contract. . . . Prima facie, the Public Administrator is the proper party to assert the claims of the estate. . . . Any collateral attack on his capacity or interest in the dispute will be before the arbitrators because the plea is assertable in the arbitration proceeding . . ." *Fitzgerald v. Steamship Company of 1949,* 167 F. Supp. 189 (S.D. N.Y., Sugarman, D.J.).

PENNSYLVANIA COURT ORDERS EMPLOYER TO ARBITRATE VACATION PAY GRIEVANCE DESPITE FACT THAT UNION TERMINATED COLLECTIVE BARGAINING AGREEMENT. The company contended that the contract termination had removed the company's obligation to arbitrate. The court, determining that there were no applicable Pennsylvania cases, looked to the case law of New York (*Potoker v. Brooklyn Eagle*, 2 N.Y. 2d 553) and New Jersey (*Botany Mills, Inc. v. TWU*, 60 N. J. Super. 18), which held that "the termination of a contract did not terminate the effect of a provision to arbitrate disputes arising out of the contract." *Textile Workers Union v. Newton & Co.*, 31 LA 766 (Penna. Supreme Ct., E.D., Cohen, J.).

WORK STOPPAGE HELD NOT TO JUSTIFY COMPANY'S REFUSAL TO ARBITRATE DISCHARGE GRIEVANCES ALTHOUGH ARBITRATOR MAY CONSIDER ITS EFFECT UNDER A BROAD ARBITRATION CLAUSE. The company contended that the strike "was a material breach . . . which either terminated the agreement . . ." or was sufficient grounds for company's non-performance. In rejecting this contention the court said: "By the terms of the submission [arbitration clause], the decision of all issues raised as a result of the acts of the parties was lodged exclusively within the jurisdiction of the arbitrators. Included in the submission were the issues raised by the defendant: whether the act of the plaintiff in conducting a strike was a material breach of the contract, and the effect of this occurrence on the rights and obligations of the parties." *Int'l Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 677 v. Trudon & Platt Motor Lines, Inc.*, 31 LA 685 (Conn. Supreme Ct. of Errors, Mellitz, J.).

REFUSAL TO ARBITRATE BACK PAY GRIEVANCE HELD VIOLATION OF WISCONSIN EMPLOYMENT PEACE ACT DESPITE PROVISION IN COLLECTIVE BARGAINING AGREEMENT THAT "WAGES ARE NOT SUBJECT TO ARBITRATION." The issue was whether back pay was due an employee who voluntarily terminated his employment between date of expiration of old contract and date of execution of new contract. The court held that the exception to arbitration covered such matters as a new wage structure, or wage scale, but did not exempt from arbitration the question of whether an employee is paid according to that wage scale. *Keikhaefer Corp. v. Wisconsin Board*, 43 LRRM 2520 (Wisconsin Circuit Ct., Winnebago County).

SERVICE ON AN INDIVIDUAL OF A COURT ORDER INVITING HIM TO SHOW CAUSE WHY ARBITRATION SHOULD NOT BE DIRECTED CONSTITUTES VALID NOTICE UNDER SECTIONS 1450 and 228 (8), N. Y. CIVIL PRACTICE ACT, particularly where that individual designated an arbitrator for the principal and attended a hearing. An agent had replied to a demand for arbitration in designating an arbitrator under a letterhead which said "representing Polar Cia De Navegacion Ltda Panama R.P." He attended a hearing with an attorney representing respondent, objected to the jurisdiction and withdrew from the hearing. The court said:

"It is clear that said [agent] was a person having such a responsible and representative relation to the corporation as to lead to a just presumption that notice to him was notice to the corporation. Accordingly, the term 'managing agent' as used in section 228, subd. 8 of the Civil Practice Act encompasses service on such a person . . ." The court further noted that "Respondent received additional notice of the commencement of these proceedings by service on the attorneys who had appeared for it in the arbitration proceeding. Under all the circumstances, as stated in the papers, due processes of law were not violated. . . ." *H. V. B. Smith v. Polar Cia de Navegacion, Ltda,* 181 N.Y.S. 2d 368 (Jacob Markowitz, J.).

STRIKE IN VIOLATION OF NO-STRIKE CLAUSE HELD NOT TO HAVE FORFEITED UNION'S RIGHT TO ARBITRATE DISCHARGE GRIEVANCE. The employer discharged the union president, claiming there was just cause for this action. When negotiations failed to reach a settlement the union, which had demanded arbitration, called a strike which lasted two months. The employer contended that the strike freed it of any obligation to arbitrate under the collective bargaining agreement. The court found that the arbitration clause covered "any claim by either party that the other party is in violation of any provision of this Agreement." It held that the Federal Arbitration Act "does not require, as a condition precedent to arbitration, that the movant not be in breach of another provision of the contract. . . . This is not to say or imply that the *arbitrator* is not to consider the question of waiver [of arbitration] as it may affect the proceedings relating to [the] discharge. Indeed, it will be his duty before considering the discharge, to weigh the strike and its legal consequence on the company's obligation to arbitrate the discharge." The court therefore held that not only was the discharge arbitrable, but "the effect of a claimed breach of the no-strike clause of the contract was arbitrable as well." *Armstrong-Norwalk Rubber Corp. v. Local Union No. 283, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO,* 167 F. Supp. 817 (D. Conn., Anderson, D.J.).

CONNECTICUT COURT REFUSES TO TEMPORARILY ENJOIN GRIEVANCE OVER VACATION PAY, HOLDING THAT EMPLOYER IS SUFFICIENTLY PROTECTED BY STATUTE COVERING REVIEW OF AWARD. Said the court: "It must be concluded that the plaintiff Company has not established the existence of such a situation as would justify the use of the court's injunctive powers. . . . In the circumstances of the present case there has been no showing that the plaintiff will be irreparably harmed in the event that the temporary injunction is denied. Furthermore it appears that the plaintiff does have an adequate remedy at law in the statutory provisions for judicial review of arbitration proceedings." *Wauregan Mills, Inc. v. Textile Workers Union of America, AFL-CIO,* 31 LA 610 (Conn. Superior Ct., New London County, House, J.).

IV. THE ARBITRATOR

ARBITRATORS HELD TO HAVE AUTHORITY TO INITIALLY DETERMINE ARBITRABILITY UNDER BROAD CLAUSE IN COLLECTIVE BARGAINING AGREEMENT COVERING THE INTERPRETATION AND APPLICATION OF THE AGREEMENT. In affirming a District Court decision vacating an award for improper proceeding with arbitration by the union without participation of the employer (digested in *Arb. J.* 1958, p. 127), the Circuit Court rejected the lower court's recommendation that the union's remedy was an application for an order compelling arbitration. The Circuit Court said: ". . . The two disputes . . . were the kind . . . that properly chosen arbitrators would have had jurisdiction to arbitrate. Mere assertion of non-arbitrability by one of the parties would not make it necessary for the other to petition for a court order to proceed, provided for in Section 4 of the United States Arbitration Act. Questions as to the arbitrability of such disputes are initially for the arbitrators and if they reach a wrong conclusion in that regard it is subject to correction by a court." *Food Handlers Local 425, Amal. Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Pluss Poultry, Inc.,* 260 F. 2d 835 (8th Cir., Woodrough, C.J.).

STATUTE OF LIMITATIONS HELD TO BE MATTER FOR ARBITRATOR BUT LACHES IS TO BE DETERMINED BY THE COURT ON A MOTION TO COMPEL ARBITRATION. While holding that the defense of Statute of Limitations can be asserted in the arbitration proceeding, nevertheless, the court said, "the defense of . . . laches must be passed upon on the instant application." *Fitzgerald v. Steamship Company of 1949,* 167 F. Supp. 189 (S.D. N.Y., Sugarman, D.J.).

AWARD WILL NOT BE VACATED BECAUSE UNION WITHDRAWS ITS PARTY-APPOINTED ARBITRATORS FROM TRIPARTITE BOARD AFTER PROCEEDINGS BEGIN. Said the court: "Obviously the Union's withdrawal from the arbitration during its progress, because the impartial chairman did not agree with its contentions, may not be permitted to defeat the award. Arbitration would be completely undermined if awards could be nullified by such strategy." *Publishers' Assoc. of New York City v. New York Stereotypers' Union No. 1,* 181 N.Y.S. 2d 527 (Hofstadter, J.).

COURT GRANTS MOTION TO APPOINT THIRD ARBITRATOR WHERE THERE HAS BEEN AN OBVIOUS LACK OF COOPERATION BY RESPONDENT OVER A PERIOD OF TIME. "A year has expired since petitioner first demanded arbitration. . . . More than two months have gone by since the respondent's arbitrator was given a list of four individuals who would be agreeable to the petitioner's arbitrator as the third member of the board of arbitration. It appears that the respondent's arbitrator has not seen fit to reply to this communication, nor has he seen fit to advise the petitioner's arbitrator of those persons who would be agreeable to him as the third member of the panel." *B. & Z. Cont. Corp. v. Isadore Rosen & Sons, Inc.,* N.Y.L.J., September 26, 1958, p. 8, Tilzer, J.

ARBITRATOR'S SUBPOENA AND SUBPOENA DUCES TECUM UPHELD WHERE WITNESS FEES AND MILEAGE FEES, THOUGH NOT TENDERED AT TIME OF SERVICE, WERE TENDERED A WEEK BEFORE RETURN DATE. *Ladenheim Fixtures Corp. v. United Mechanics Local 150,* N.Y.L.J., September 15, 1958, p. 5, Tilzer, J.

DEATH OF PARTY-APPOINTED ARBITRATOR AFTER HEARINGS BUT BEFORE DECISION HELD GROUNDS FOR VACATING AWARD. In directing the arbitration to commence anew, the court said: "In most instances an award by two arbitrators is binding even though a third withdraws before the award is rendered. This is not so, however, when one of the arbitrators dies after the hearing but before the decision has been made or the award rendered. The deceased arbitrator cannot be deemed to be a mere dissenter, for through his efforts during the deliberations he may be able to persuade one or both surviving arbitrators to come to a different result. . . . Under the circumstances presented here, it is clear that this decision was had and the award rendered without the benefit of the counsel and advice of the deceased arbitrator." *Fromer Foods, Inc. v. Edelstein Foods, Inc.,* 181 N.Y.S. 2d 352 (Nathan, J.).

JERSEY COURT CRITICIZES TRIPARTITE ARBITRATION SYSTEM, STATING: "I cannot be too critical of this provision in the collective bargaining agreement that provides for this Tripartite Arbitration Board, which results in three arbitrators who consist of the president of the labor union as one of the arbitrators, an industrial relations manager as a second member, and the only person who has any impartiality about him is the third member who is selected by the other two. I think that setup is the cause of this very controversy that exists in this case today. I can see where it results in all kinds of complications, confusion and even conflict because certainly the president of the labor union as well as the industrial labor relations officer are not going to exercise any impartial judgment on the matters submitted to the arbitration panel." *Local 1857, Int'l Bro. of Electrical Workers, AFL-CIO v. Metal Textile Corp.,* Superior Ct. of New Jersey, Chancery Div., Union County, C 1485-57, Sullivan, J.

THERE BEING A DISPUTE AS TO WHETHER THE ARBITRATORS, HAVING ACCEPTED AFFIDAVITS, REFUSED TO HEAR THE PETITIONER'S WITNESSES, THE COURT REMANDED THE MATTER SO THAT THE ARBITRATORS MIGHT HEAR THE PROFFERRED TESTIMONY. It was unclear whether petitioner, having offered the affidavits, also reserved his right to have the affiants testify in person. The court said: "In view of the fact that there is no transcript of the minutes of the arbitration, and since there is such a sharp conflict between the parties on the issue of whether the arbitrators refused to hear the witnesses for the petitioner, I have determined, in the exercise of discretion, to set aside the award and remit the matter to the arbitrators for the sole purpose of hearing the testimony of the petitioner's witnesses (see Civ. Prac. Act, sec. 1462, subdiv. 3; *Gervant v. N. E. Fire Ins. Co.,* 306 N.Y. 393). Of course, the arbitrators are not required to hear over again the testimony taken at the hearing

unless, in their discretion, they deem it advisable to do so." *Joseph Love, Inc. v. French Fabrics Corp.*, N.Y.L.J., November 17, 1958, p. 13, Benvenga. J.

FAILURE TO MAKE OBJECTION UPON ARBITRATOR'S DEMAND FOR FEE PAYMENT PRIOR TO AWARD HELD WAIVER OF RIGHT TO ATTACK AWARD FOR SUCH IRREGULARITY. Said the court: "Petitioner has failed to submit any proof or evidence that the alleged anxiety on the part of *one* of the arbitrators regarding security for the payment of his fee, and the subsequent payment by the parties prior to the handing down of the award, materially or in any way affected the determination of the arbitrators, even though such act and undue concern on the part of this arbitrator was unjudicious. However, notwithstanding the alleged demand, petitioner proceeded with the arbitration without making any objections until the present motion [to vacate]. The law is well settled that a party who proceeds without objection after knowledge of the alleged irregularities will be deemed to have waived his rights in regard thereto." *Bichler v. 100 Lexington Avenue Corp.*, N.Y.L.J., December 3, 1958, p. 13, Martuscello, J.

V. ARBITRATION PROCEEDINGS

COURT HAS POWER TO CONSOLIDATE ARBITRATION PROCEEDINGS WHEN IT DEEMS IT NECESSARY TO AVOID DUPLICATION OR REPETITION. The dissenting opinion agreed with the majority on the source of this discretionary power, but differed on application in the instant case. The court held that "An examination of the claims and counterclaims in each of the proceedings clearly indicates that the issues in dispute are substantially the same in both, except that the second covers a period of time extending beyond the first." The dissent, which discussed the power to consolidate more fully than the majority, felt that each dispute required a different type of arbitrator, and said: "There is no clear showing of the necessity for consolidation. Absent that, there is no reason why a limitation should be imposed upon the parties by consolidation." *Adam Consolidated Industries v. Miller Bros. Hat Co.*, 6 A.D. 2d 515, 180 N.Y.S. 2d 507.

WHETHER LIBELANT WAS ENTITLED TO ATTACH FUNDS OWED BY THIRD PARTIES TO RESPONDENT HELD TO BE QUESTION FOR THE ARBITRATORS IN PROCEEDINGS COMMENCED IN LONDON BY RESPONDENT AGAINST LIBELANT. The contract was a time charter for hire of a vessel. Arbitrators were appointed in London pursuant to the agreement. However, before hearings commenced, libelant sought to attach the funds. The court said: "It is my opinion the libelant is not entitled to have the sub-freights . . . paid over to it. Paragraph 18 of the time charter . . . provides that libelant shall have a *lien* upon all cargoes and sub-freights for the amounts due under the charter. That does not mean that the right to such funds is absolute, and that the respondents may not assert defenses to the claim thereto. . . . To direct (payment of) sub-freights would, in effect, be exercising part of the functions of the arbitrators, who, under the charter agreement, are to determine the claims and the rights of the parties."

Bienvenido Shipping Co., Ltd. v. The Sub-Freights of the S.S. Andora, 168 F. Supp. 127 (E.D. N.Y., Rayfiel, D.J.).

PARTIES IN INTEREST WHO HAVE NOT PARTICIPATED IN ARBITRATION PROCEEDINGS ARE HELD NOT TO NEED PROTECTION OF A TEMPORARY STAY PENDING DETERMINATION OF A MOTION FOR A PERMANENT STAY OF ARBITRATION. Employers and a group of workers entered into arbitration concerning seniority. A second group of workers (petitioners), while not participating, sought a permanent stay, contending that their rights were being affected by the arbitration to which they were not even a contractual party. In order to further protect their position the second workers group sought a temporary stay until the main motion (permanent stay) could be decided. The court, in refusing this motion, said: "If petitioner and his group are such parties in interest with respect to any contract claimed by respondents to have been made by them as employers on the one hand, and the union as the collective bargaining agent on the other hand, and with respect to the controversy, then their claimed nonparticipation in the selection of the arbitrator or in the arbitration proceedings is sufficient protection both as to the main motion or any award which may issue." ***Cuff v. New York Shipping Association,*** 14 Misc. 2d 263, 181 N.Y.S. 2d 895 (Aurelio, J.).

COURT PERMITS INDEPENDENT EMPLOYEE GROUP TO INTERVENE IN ARBITRATION PROCEEDING BETWEEN UNION AND EMPLOYER, HOLDING THAT UNION IS NOT IMPARTIAL AND THERE IS NO DANGER THAT CONFUSION WILL ENSUE. The court held: "The employee may demand arbitration if the union is neglectful of his interests. Under this view, the employee would clearly have the right, in a case where an arbitration proceeding was instituted by the union, to intervene in the proceeding and to move to vacate the award if the award were an adverse one." The court found that the union had a history of collusion with the employer, and that the atmosphere was not pure. It further held that the possibility of "chaos and confusion", while present in some cases where intervention is sought, was not a factor in the instant case. ***Iroquois Beverage Corp. v. Int'l Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America,*** 14 Misc. 2d 290 (Erie County, Williams, J.).

VI. THE AWARD

APPELLATE DIVISION AFFIRMS CONFIRMATION OF AWARD (DIGESTED IN ARB. J. 1958, p. 57) GRANTING SPECIFIC PERFORMANCE OF CONTRACT BY ORDERING APPELLANT TO RESTORE PETITIONER AS "MANAGER OF PRODUCTION AND ENGINEERING." "When there is an adequate remedy at law equity will the more quickly refrain from granting the extraordinary relief that has been historically associated with equity. But in the case of arbitration no distinction is made between these forms of relief . . . The granting of specific relief in arbi-

tration does not depend upon the inadequacy of the remedy at law or anywhere else. . . . Arbitration may provide relief in circumstances and on conditions which even a court has no power to grant." In rejecting the dissent's contention that the prior authority for reinstatement involved collective bargaining situations and not the key officer in a large corporate entity, the majority of the Appellate Division stated: "It becomes apparent then that the distinction here, if any, must be because of the job level, for, as pointed out, employment contracts as such, and awards thereunder directing reinstatement, have been upheld. If it is also recognized that arbitration is voluntary; that the parties have elected the forum in which they wish to resolve their disputes, primarily because of the reputed promptness and finality of arbitration; and that the statute has merely added a new implement, 'the remedy of specific performance for its more effectual enforcement', the objection to specific relief appears specious." *Staklinski v. Pyramid Electric Co.*, 6 A.D. 2d 565, 180 N.Y.S. 2d 20 (1st Dept., Stevens, J.).

AWARD RESTRAINING RESPONDENT FROM ENGAGING IN THE PRACTICE OF ORTHOPEDIC SURGERY WITHIN A RADIUS OF THREE MILES OF PETITIONER'S OFFICE FOR THE PERIOD OF ONE YEAR DATING FROM THE ORDER OF THE SUPREME COURT CONFIRMING THE AWARD, HELD TO BE VALID. The agreement provided for a negative covenant of one year from the termination of the partnership, "unless the partnership was terminated by the petitioner without 'good cause'." The arbitrators found termination to be for good cause. Holding that *Matter of Ruppert*, 3 N.Y. 2d 576, 170 N.Y.S. 2d 785 (digested in *Arb. J.* 1958, p. 61), is authority for injunctive relief, the court said: "The interpretation of the restrictive covenant by the arbitrators is correct. Anyway, interpretation was within their province. . . . The restrictive covenant, in the light of the circumstances of this case, is not so clear as to need no interpretation. . . . This was a reasonable interpretation; and they had the power to interpret" *Dembitzer v. Gutchen*, 3 A. D. 2d 211, aff'd 3 N.Y. 2d 851, digested in *Arb. J.* 1957, p. 56, 170). *Linwood v. Sherry*, 178 N.Y.S. 2d 492 (Pittoni, J.); aff'd 181 N.Y.S. 2d 772.

EX PARTE JUDGMENT BASED UPON EX PARTE AWARD ISSUED BY FEDERAL COURT IN OREGON IS SUBJECT TO JURISDICTIONAL ATTACK UNDER FEDERAL ARBITRATION ACT ON THE GROUNDS OF NO WRITTEN AGREEMENT TO ARBITRATE WHEN ENFORCEMENT IS SOUGHT IN FEDERAL COURT IN GEORGIA. A Georgia party ordered apples from a Washington supplier. Subsequently the purchaser sold his business to the appellant, who, upon receipt of the apples, rejected 250 cases and requested disposition by the supplier. The latter, claiming the contract required arbitration under the National Wholesale Groceries Association Rules, which provide for arbitration at the point nearest delivery, initiated proceedings against appellant. Upon appellant's refusal to arbitrate because it had not assumed an arbitration agreement, an ex parte award was rendered in Portland, Oregon in favor of the supplier. In serving notice by mail pursuant to Section 9 of the Federal Arbitration Act,

he obtained an ex parte judgment, which he sought to enforce in the Federal Court in Georgia. The appellant contended that service by mail under the Act did not foreclose his right to show that there never was a written agreement to arbitrate and that if there was, the nearest point of arbitration under the Rules was Cincinnati and not Portland. Holding that the Oregon court "could acquire jurisdiction over the person of a non-resident only if there existed a written contract for arbitration," and that such ex parte judgment did not preclude the Georgia party from raising the issue, the court said: "Absent an agreement to arbitrate in the place which alone would give the Oregon District Court jurisdiction, that court's process was void in Georgia. Absent valid service the non-resident defendant was not before the court, and no adjudication in personam could be binding as to it. It must, therefore, be open to the district court . . . to inquire into the truth or falsity of the jurisdictional allegations which have not been adjudicated by a court having jurisdiction of one of the parties." The Circuit Court remanded the matter to the District Court to determine the existence of the written contract. *Hanes Supply Co. v. Valley Evaporating Co.*, 261 F. 2d 29 (5th Cir., Tuttle, C.J.).

AWARD BASED UPON EIGHT CONTRACTS ALTHOUGH SUBMISSION COVERED ONLY SIX UPHELD WHERE RESPONDENT DID NOT OBJECT AND REFERRED DURING HEARINGS TO GOODS COVERED BY ALL THE CONTRACTS. In reversing the lower court decision which had vacated the award (digested in *Arb. J.* 1958, p. 175), the Appellate Division, First Department, said: "There is adequate proof in the record that the respondent did not object to the consideration by the arbitrators of the full series and of the quality of total poundage." The court went on to consider the frequent references to the whole series of contracts by the respondents at the hearing and concluded that "All this seems to add strength to the proof in the record that there was a full submission of the controversy." *Brodnax Mills, Inc. v. Neisler Mills Div. of Massachusetts Mohair Plush Co.*, 7 A.D. 2d 220, 181 N.Y.S. 2d 798.

FEDERAL DISTRICT COURT, HAVING COMPELLED EMPLOYER UNDER SECTION 301(a) TAFT-HARTLEY ACT TO ARBITRATE DISCHARGE GRIEVANCE IN ACCORDANCE WITH COLLECTIVE BARGAINING AGREEMENT, RETAINS JURISDICTION TO GRANT UNION'S MOTION TO ENFORCE AWARD REINSTATING EMPLOYEES AND GRANTING THEM BACK PAY DESPITE PERSONAL NATURE OF SUCH PAYMENTS. The employer contended that under the *Westinghouse* case (348 U.S. 437, 1955), the payments were uniquely personal to the employees. The court distinguished this case by the fact that it involved a suit by the union to recover unpaid wages and not discharge grievances, "being prosecuted by the union primarily to obtain reinstatement of the workers with the monetary award a secondary consideration." In discussing the legislative purpose of the Taft-Hartley Act the court commented that "In arriving at the rules to be applied by the courts . . . certainly Congress did not intend that Federal Courts should have the power

to require employers and unions to submit their differences to arbitration, but those same courts should have no power to see that the parties accept the arbitrator's decision. The *Lincoln Mills* case [353 U.S. 448, 1957] found a Congressional policy favoring the peaceful settlement of labor disputes by the use of arbitration, and I think it completely consonant with the policy to hold that once this Court has compelled arbitration the Court has power to see that its order is fully carried out. I therefore reject defendant's contention that this court is without jurisdiction because personal rights of individuals are affected. This court had jurisdiction, under § 301 as interpreted by the *Lincoln Mills* case, of this action when it originated because a union controversy was involved. The union and the employer were the only parties to the collective bargaining contract which this Court ordered specifically performed with regard to arbitration." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 168 F. Supp. 308 (S.D. West Virginia, Watkins, D.J.).

MICHIGAN SUPREME COURT HOLDS THAT EMPLOYEE WHO WAS REINSTATED BUT WITHOUT BACK PAY BY AWARD OF AN ARBITRATOR MAY SUE EMPLOYER FOR BACK PAY SINCE THE CONTRACT EXPRESSLY PROVIDED THAT IN THE EVENT OF DISCHARGE WITHOUT JUST CAUSE THE EMPLOYEE WOULD BE REINSTATED "WITH FULL SENIORITY AND SHALL RECEIVE PAY FOR ALL TIME LOST FROM WORK." In holding that the only issue before the arbitrator was the propriety of the discharge, the court said: "Pursuing agreed procedure, the question of plaintiff's claimed unjust discharge was put to the arbitrator for determination. He decided that issue by ruling that plaintiff had been unjustly discharged. His jurisdiction and authority stopped there and the shop contract took over for the admeasurement of plaintiff's rights." *Carr v. Kalamazoo Vegetable Parchment Co.*, 354 Mich. Rep. 327 (Supreme Ct., Black, J.).

COURT VACATES AWARD UPHOLDING DISCHARGE UPON MOTION BY INDIVIDUAL EMPLOYEES PREJUDICED BY DENIAL OF RIGHT TO BE REPRESENTED BY THEIR OWN ATTORNEY AT ARBITRATION HEARING UNDER CIRCUMSTANCES SHOWING THAT THE UNION WOULD NOT ADEQUATELY REPRESENT THEM. The court, discussing the generally unsettled law on the rights of individual employees, held that while "the union has control over grievance procedures, there must be implied a duty of fair representation." The court then outlined the history of an inter-union quarrel and said: "Certainly a case was made by petitioners for permitting them to be represented by their own counsel in the arbitration hearings. Enough was shown to negative the possibility of fair representation of the interests of petitioners by Local 122. The denial of the right to independent representation, under the special circumstances of this case, vitiated the award rendered in the absence of the petitioners at the hearings, particularly since the evidence which they were seeking to adduce on the question of collusion went directly to the issues to be decided by the arbitrator." *Soto v. Lenscraft Optical Corp.*, 7 A.D. 2d 1, 180 N.Y.S. 2d 388 (Valente, J.).

ARBITRATOR NEED NOT COMPUTE BACK PAY OF EACH GRIEVANT IN HIS AWARD; IT BEING SUFFICIENT THAT HE SUPPLY A FORMULA WHICH IS SPECIFIC. The court said that the arbitrator need not have "gone through the accounting process of computing precisely how much back pay each aggrieved employee is entitled to receive, or how much must be deducted by reason of wages earned elsewhere during the period these employees were wrongfully deprived of employment. A good faith compliance with the award by both parties eliminates the necessity of the arbitrator considering such petty, ministerial computations." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 168 F. Supp. 308 (S.D. West Virginia, Watkins, D.J.).

ARBITRATION BEING A SPECIAL PROCEEDING AND AS SUCH DISTINCT FROM ANY ACTION ON THE CONTRACT, THE SUPREME COURT FOR THE COUNTY IN WHICH ONE OF THE PARTIES RESIDES OR IS DOING BUSINESS OR IN WHICH THE ARBITRATION WAS HELD, HAS JURISDICTION TO CONFIRM AN AWARD DESPITE FACT THAT CONTRACT ACTION HAS ANOTHER VENUE. *Kreisler-Borg Const. Co. v. Mankowski*, N.Y.L.J., November 18, 1958, p. 12, Benvenga, J.

TEXAS APPEAL COURT CONFIRMS AWARD, HOLDING THAT IT WAS ERROR FOR THE TRIAL COURT TO SUBMIT ISSUES ON THE MERITS TO A JURY UPON A SUIT TO ENFORCE THE AWARD. The jury found that the arbitrator had merely noted damages and repair costs in a building dispute and did not consider whether the builder had caused the damage. The court held that under Texas law an award can be set aside only for fraud, misconduct or gross mistake implying fraud or for excess of authority. Said the court: "The arbitrators were authorized to assess the damage caused by Bagwell, and this they did . . . They found that he did not build the house according to the plans and specifications, and that all the damage they assessed was his. The award is certainly full and complete on its face." *Haddad v. Bagwell*, 317 S.W. 2d 781 (Texas Civ. App., Williams, J.).

FAILURE TO MOVE UNDER SECTION 1463 N.Y. C.P.A. TO VACATE AWARD WITHIN THREE MONTHS AFTER ITS FILING HELD FATAL. *Bisson v. Starr*, N.Y.L.J., September 26, 1958, p. 11, Scileppi, J.

AN AWARD MAY NOT BE VACATED ON THE GROUND THAT THE ARBITRATORS DID NOT GIVE REASONS FOR THEIR AWARD. REASONS NEED NOT BE STATED. *Linwood v. Sherry*, 178 N.Y.S. 2d 492 (Pittoni, J.); aff'd 181 N.Y.S. 2d 772.